



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF K-C-O-S-W-L-A-, INC.

DATE: AUG. 16, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a religious organization/church, seeks to employ the Beneficiary as an associate pastor. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition. The Director determined that the Petitioner had not established that the Beneficiary possessed an advanced degree required for the offered position and for classification as an advanced degree professional. Specifically, the Director found that the Beneficiary's master's degree in divinity was not issued by an accredited U.S. institution.

The matter is now before us on appeal. The Petitioner asserts that the Beneficiary meets the educational requirements of the labor certification because his degree was issued while the issuing U.S. institution was pre-accredited. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL, accompanies the instant petition. By approving the labor certification, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II).

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In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on a labor certification and the requirements of the requested immigrant classification. See section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that the immigration service has authority to make preference classification decisions).

The priority date of this petition, which is the date the DOL accepted the labor certification for processing, is June 14, 2013.¹ See 8 C.F.R. § 204.5(d).

A. The Beneficiary's Education

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Part H of the instant labor certification states that the minimum requirement of the proffered position is a master's degree in divinity, theology, or a related field.

Part J of the labor certification states that the Beneficiary possesses a master's degree in divinity from the [REDACTED] California, completed in 2010. The record contains a copy of the Beneficiary's master of divinity graduation certificate and transcripts from [REDACTED] California, completed on June 5, 2010.

While the regulatory language of 8 C.F.R. § 204.5(k)(2) does not specifically state that a degree must come from an accredited college or university to qualify as an "advanced degree," the requirement is implicit in the regulation. The Act is a federal statute with nationwide application. The regulations implementing the Act, including 8 C.F.R. § 204.5(k)(2) defining "advanced degree" for the purposes of section 203(b)(2) of the Act, as well as 8 C.F.R. § 204.5(l)(2) defining "professional" for the purposes of section 203(b)(3) of the Act, also have nationwide application. As defined in 8 C.F.R. § 204.5(k)(2), an "advanced degree" includes "any **United States academic or professional degree . . . above that of baccalaureate**" (or a foreign equivalent degree), "[a] **United States baccalaureate degree**" (or a foreign equivalent degree) and five years of specialized experience (considered equivalent to a master's degree), and "a **United States doctorate**" (or a foreign equivalent degree) (emphasis added). Similarly, "professional" is defined in 8 C.F.R. § 204.5(l)(2) as "a qualified alien who holds at least a **United States baccalaureate degree**" (or a foreign equivalent degree) (emphasis added). The repeated modifier "United States" to describe the

¹ The priority date is used to calculate when the beneficiary of the visa petition is eligible to adjust his or her status to that of a lawful permanent resident. See 8 C.F.R. § 245.1(g).

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different levels of (non-foreign) degrees makes clear the intention of the rule makers that the regulations apply to degrees issued by U.S. educational institutions that are recognized and honored on a nationwide basis. The only way to assure nationwide recognition for its degrees is for an educational institution to secure accreditation by a regional accrediting agency approved by the U.S. Department of Education (USDE) and Council for Higher Education Accreditation (CHEA). *See Yau v. INS*, 13 I&N Dec. 75 (Reg'l Comm'r 1968) (a degree issued by an unaccredited institution does not qualify as a professional within the statute granting preference classification.).

Accreditation is the process of conducting nongovernmental, peer evaluation of educational institutions and programs to ensure that educational institutions or programs are operating at basic levels of quality and provides a reasonable assurance of quality and acceptance by employers of diplomas and degrees. The Secretary of Education is required by law to publish a list of nationally recognized accrediting agencies that are reliable authorities as to the quality of education or training provided by the institutions of higher education and the higher education programs they accredit. The USDE's purpose in ascertaining the accreditation status of U.S. colleges and universities is to determine their eligibility for federal funding and student aid, and participation in other federal programs. *See Accreditation in the United States*, USDE, www.ed.gov/print/admins/finaid/accred/accreditation.html (accessed May 26, 2016).

The CHEA is an association of 3,000 degree-granting colleges and universities that accredits higher education institutions as a key strategy to assure quality, accountability, and improvement in higher education. *See Recognition of Accrediting Organizations Policy and Procedures*, CHEA, www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf (accessed May 26, 2016).

In this case, the accrediting authority is the Association for Biblical Higher Education (ABHE).² The record reflects that the Beneficiary's master of divinity was issued on June 5, 2010, and that [REDACTED] was not accredited by the ABHE until February 23, 2011. *See Database of Institutions and Programs Accredited by Recognized United States Accrediting Organizations*, CHEA, www.chea.org/search/default.asp (accessed May 26, 2016). ABHE pre-accredited [REDACTED] on February 15, 2006. ABHE states that accreditation of an institution is not retroactive. *See* www.abhe.org/pages/accreditation/NAV-FAQ.html (accessed May 26, 2016). Therefore, [REDACTED] 2011 accreditation is not retroactive and the Beneficiary's degree cannot be deemed to be one issued by an accredited institution.

The Petitioner cites the Higher Education Act of 1965 (HEA) and a May 6, 2006, USCIS memorandum to support its assertion that the Beneficiary's master of divinity meets the regulatory requirements because the governing statute and USCIS regulations clearly and unambiguously encompass pre-accredited institutions. *See* Memorandum from Michael Aytes, Acting Associate

² The Council for Higher Education Association (CHEA) and the U.S. Department of Education (USDE) identifies ABHE as a recognized U.S. accrediting organization. *See Recognized Accrediting Organizations*, CHEA, www.chea.org/pdf/CHEA_USDE_AllAccred.pdf (accessed May 26, 2016).

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Director, Domestic Operations, *AFM Update: Chapter 31: H-1B Cap Exemption for Aliens Holding a Master's or Higher Degree from a U.S. Institution* (AD06-24), HQPRD 70/23.12 (May 2, 2006), <http://www.uscis.gov/laws/policy-memoranda>. However, the memorandum cited by the Petitioner applies to non-immigrant H-1B petitions, not to immigrant petitions. Moreover, HEA's definition of an institution of higher education is for the purpose of providing financial assistance for students in postsecondary and higher education and does not relate to the accreditation requirements of the USDE and CHEA discussed above. *See* Higher Education Act of 1965, Pub.L. 89-329. Status under the HEA as an institution of higher education has no bearing on whether a degree issued by [REDACTED] meets the requirements of section 203(b)(2) of the Act.

For the reasons explained above, the Petitioner has not established that the Beneficiary possesses a master's degree in divinity, theology, or a related field from an accredited U.S. institution.

B. Ability to Pay Proffered Wage

Although not addressed by the Director, we independently note that the record does not establish that the Petitioner has the ability to pay the proffered wage from the priority date onwards.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The proffered wage is \$44,034 per year.

The record does not contain the Petitioner's annual reports, federal tax returns, or audited financial statements for 2014 or 2015. In any future filings, the Petitioner must submit its annual reports, federal tax returns, or audited financial statements for 2014 and 2015, and any IRS Forms W-2, Wage and Tax Statements, or IRS Forms 1099-MISC, Miscellaneous Income, issued to the Beneficiary for 2014 and 2015.

II. CONCLUSION

In summary, the Petitioner did not establish that the Beneficiary meets the minimum requirements of the labor certification. The Director's decision denying the petition is affirmed. The record also does not establish that the Petitioner has the ability to pay the proffered wage from the priority date onwards.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of K-C-O-S-W-L-A-, Inc.*, ID# 17512 (AAO Aug. 16, 2016)